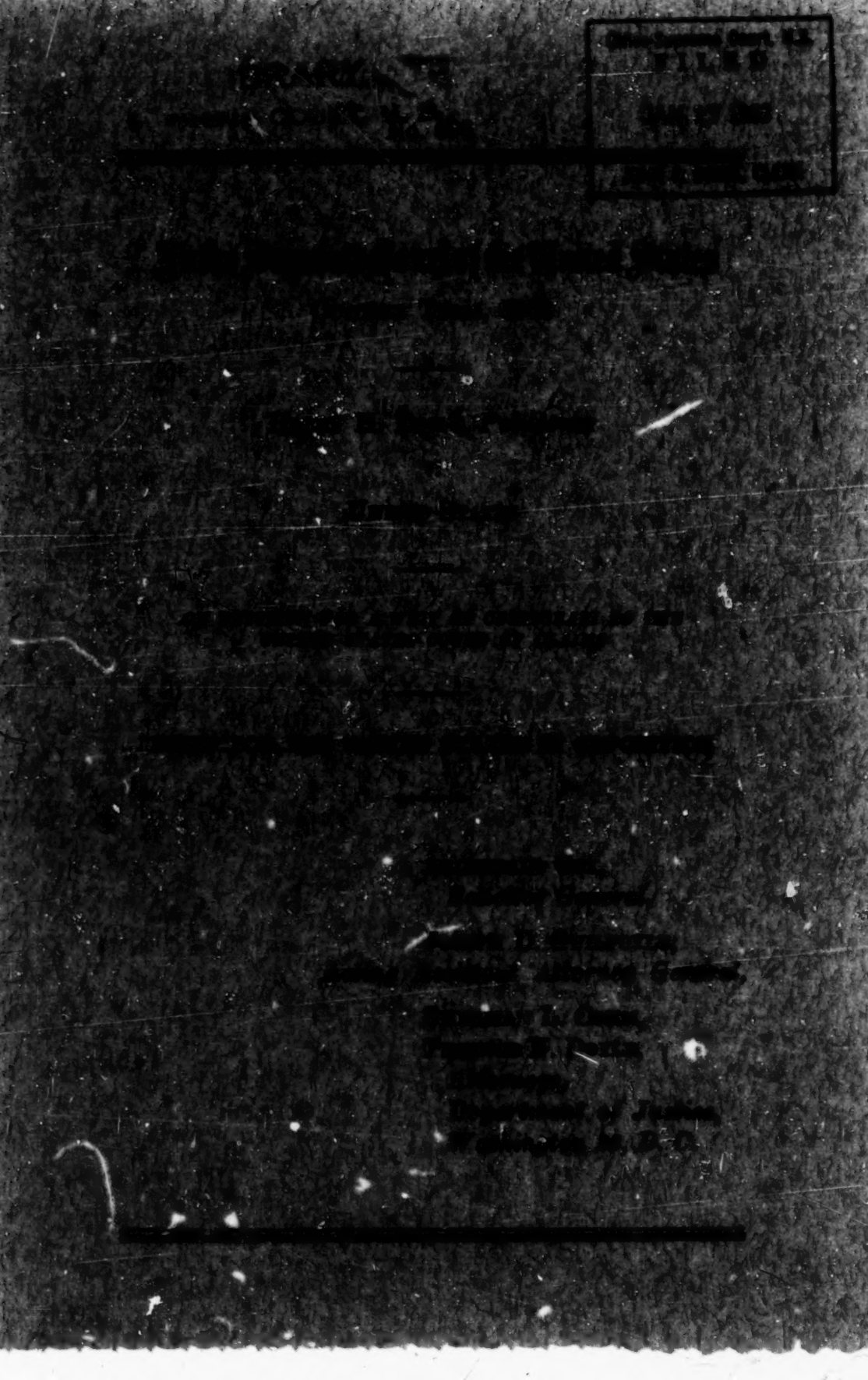

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 696

HARRY H. DRILL, *Petitioner*

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the Court of Claims granting respondent's motion to dismiss petitioner's claims (Pet. App. 9a) is not reported.

JURISDICTION

The judgment of the Court of Claims was entered on June 22, 1962. A timely motion to reconsider was overruled on October 3, 1962. The petition for a writ of certiorari was filed on December 26, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the Court of Claims correctly dismissed petitioner's claims for failure to state a cause of action.

2. Whether the Court of Claims has jurisdiction to grant declaratory relief.

STATUTES INVOLVED

The Veterans Preference Act, 58 Stat. 387, as amended, 5 U.S.C. 851, provides in relevant part:

> Sec. 2 [5 U.S.C. 851]. In certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions in all establishments, agencies, bureaus, administrations, projects and departments of the Government, permanent or temporary, and in either (a) the classified civil service; (b) the unclassified civil service; (c) any temporary or emergency establishment, agency, bureau, administration, project, and department created by Acts of Congress or Presidential Executive order; and (d) the civil service of the District of Columbia, preference shall be given to (1) those ex-service men and women who have served on active duty in any branch of the armed forces of the United States and have been separated therefrom under honorable conditions and who have established the present existence of a service-connected disability or who are receiving compensation, disability retirement benefits, or pension by reason of public laws administered by the Veterans' Administration, the Department of the Army or Department of the Air Force or the Navy Department; * * *.

Sec. 3 [5 U.S.C. 852]. In all examinations to determine the qualifications of applicants for entrance into the service ten points shall be added to the earned ratings of those persons included under section 2(1), (2), (3), and (5), and five points shall be added to the earned ratings of those persons included under section 2 (4) and (6) of this Act * * *.

Sec. 8 [5 U.S.C. 857]. When, in accordance with civil-service laws and rules, a nominating or appointing officer shall request certification of eligibles for appointment purposes, the Civil Service Commission shall certify, from the top of the appropriate register of eligibles, a number of names sufficient to permit the nominating or appointing officer to consider at least three names in connection with each vacancy. The nominating or appointing officer shall make selection for each vacancy from not more than the highest three names available for appointment on such certification, unless objection shall be made, and sustained by the Commission, to one or more of the persons certified, for any proper and adequate reason, as may be prescribed in the rules promulgated by the Civil Service Commission: *Provided*, That an appointing officer who passes over a veteran eligible and selects a nonveteran shall file with the Civil Service Commission his reasons in writing for so doing, which shall become a part of the record of such veteran eligible, and shall be made available upon request to the veteran or his designated representative; the Civil Service Commission is directed to determine the sufficiency of such submitted reasons and, if found insufficient, shall require such appointing officer to submit more detailed information in support thereof; the findings of the Civil Service Commission as to the sufficiency

or insufficiency of such reasons shall be transmitted to and shall be complied with by such appointing officer, and a copy thereof shall be sent to the veteran eligible or to his designated representative upon request therefor * * *.

Sec. 15 [5 U.S.C. 864]. Any preference eligible, who has been furloughed, or separated without delinquency or misconduct, upon request, shall have his name placed on all appropriate civil-service registers and/or on all employment lists, for every position for which his qualifications have been established, as maintained by the Civil Service Commission, or as shall be maintained by any agency or project of the Federal Government, or of the District of Columbia, in the order as provided in section 7 hereof, and shall then be eligible for recertification and reappointment in the order and according to the procedure as provided for in sections 7 and 8 hereof. No appointment shall be made from an examination register of eligibles, except of ten-point preference eligibles, when there are three or more names of preference eligibles on any appropriate reemployment list for the position to be filled.

The Act of June 25, 1948, 62 Stat. 940, as amended, 28 U.S.C. 1491, provides in relevant part:

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

* * * * * * * * *

STATEMENT

According to the allegations set forth in his complaint in the Court of Claims, petitioner, a 52 year old attorney, is a repeatedly unsuccessful applicant for federal employment. He began submitting applications for employment to various executive agencies in 1959 (R. 32, 75).[1] The applications set forth his qualifications for the position sought, including his status as a veteran preference eligible with a ten per cent disability rating (Pet. 9-10). Each of the executive agencies to which he applied informed petitioner that none of the positions sought was available at the time (R. 14, 89, 143, 149, 172).[2]

Petitioner then brought this action against the United States in the Court of Claims, seeking declaratory relief and money damages based upon the failure of the various executive agencies to act favorably upon his applications for employment. Specifically, petitioner alleged that each of the agencies to which he had applied, by failing to act favorably upon his application for employment, had violated rights secured by Article I, Section 9, clause 3 of the Constitution, the Fifth Amendment, the Veterans Preference Act, and the regulations of the Civil Service Commission implementing the Veterans Preference Act (Pet. 6).[3] In addition, petitioner alleged that the refusal of each

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[1] "R." refers to the petition filed with the Court of Claims.

[2] Between 1944 and 1953, petitioner had been employed by federal agencies and, on each occasion, he was dismissed due to a reduction in force (R. 4, 13). He makes no complaint as to the legality of these dismissals.

[3] Petitioner apparently has abandoned in this Court his claim for damages arising under the regulations implementing the Veterans Preference Act, 5 C.F.R. 2.101 (Pet. 5-6).

of the executive agencies to act favorably upon his application constituted a breach of a contractual obligation allegedly owed by the United States to eligible applicants for employment, and imposed by the Veterans Preference Act, 58 Stat. 387, 5 U.S.C. 851. In his prayer for relief, petitioner sought a declaratory judgment, as well as damages for breach of contract and violation of his constitutional and statutory rights.

The United States moved to dismiss on the grounds (1) that the Court of Claims lacked jurisdiction to grant declaratory relief, and (2) that petitioner's claim for money damages based upon allegations that the United States violated the Constitution and the Veterans Preference Act, and that it breached its contractual relationship with petitioner, failed to state a claim upon which relief could be granted. The Court of Claims, concluding "that plaintiff has failed to state a proper cause of action and seeks relief beyond the jurisdiction of this court," dismissed the petition (Pet. App. 9a).

ARGUMENT

1. The petition confuses "cause of action" against the United States with "claims for money damages." For purposes of the present case, it is, of course, irrelevant whether petitioner's allegations may constitute a "cause of action" against the United States. Congress has carefully limited the jurisdiction of the Court of Claims to claims for money damages, 28 U.S.C. 1491. Therefore, a litigant in that court must establish that his cause of action is one that entitles him to monetary relief.

It is clear that the failure of an executive agency to act favorably upon an application for employment

cannot, under any of the theories advanced by petitioner, create a proper claim for money damages against the United States. Specifically, neither of the alleged violations of petitioner's constitutional rights (Pet. 2-3) supports a claim for money damages against the United States. *Schillinger* v. *United States*, 155 U.S. 163, 168; *Lynch* v. *United States*, 292 U.S. 571, 582; *Pflueger* v. *United States*, 121 F. 2d 732 (C.A.D.C.), certiorari denied, 314 U.S. 617; *Bell* v. *Hood*, 71 F. Supp. 813 (S.D. Calif.).

Nor is there any authority to support petitioner's theory that a claim for money damages may be founded upon the breach of an alleged contractual obligation arising out of the Veterans Preference Act. To an otherwise qualified veteran applying initially for a federal position, the Veterans Preference Act does no more than grant five or ten point preferences on the competitive rating scale. 5 U.S.C. 851 and 852, *supra*, p. 2. It does not guarantee employment in any position the applicant might choose. A veteran who has been discharged from a federal position in connection with a reduction in force has the right to reemployment in a position for which he is otherwise qualified in preference to any nonveteran or any other veteran who has not been similarly discharged. 5 U.S.C. 864, *supra*, p. 3. Again, the discharged veteran is not given an absolute contractual right to employment, but is merely entitled to have his name given a preferred place upon the application lists for all positions for which his qualifications have been established. 5 U.S.C. 864. The top three names from the appropriate lists of eligibles are then submitted to an appointing officer who is authorized to make his selection from no more than the three highest eligibles. If the top three eligi-

bles are qualified veterans, the appointing officer has unfettered discretion to select any of the three. If he appoints, from among the three, a nonveteran, passing over an eligible veteran, the Act provides that he must give to the Civil Service Commission his reasons for passing over the eligible veteran. The Commission has authority to determine the sufficiency of these reasons, and if it considers them insufficient, so to inform the hiring agency. 5 U.S.C. 857. Nowhere in these statutes is there an absolute contractual right to federal employment, denial of which might give rise to an action for money damages.

2. In the alternative, petitioner seems to suggest that his claim for money damages may at least be used to invoke the ancillary jurisdiction of the Court of Claims to determine claims for declaratory relief (Pet. 16-17). It is well settled, however, that Congress, in its wisdom, prohibited the Court of Claims from rendering any judgment other than for the payment of money. *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 557; *United States* v. *Jones*, 336 U.S. 641.[4] This is especially true where the claim for money damages is patently without substance.

3. In accordance with the statutory provisions prescribed by the Act, petitioner presented to the Civil Service Commission his objection regarding the treatment of his application for employment by the N.L.R.B. (Pet. 11). The Commission determined that none of his rights had been abridged (Pet. App. 11a-14a),

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[4] In any event, petitioner's claims are so unsubstantiated that it should be unnecessary even to consider the issue of ancillary jurisdiction in the present case. See *Hurn* v *Oursler*, 289 U.S. 238.

and its decision was affirmed by the Board of Appeals and Review (Pet. App. 16a-20a). Petitioner concedes that he has made no effort to seek judicial review of the final administrative determination (Pet. App. 12). Obviously, if petitioner's rights have been infringed he has selected the wrong forum in which to assert them.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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